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IN THE

# SUPREME COURT OF THE UNITED STATES

NO. 431

NATIONAL LABOR RELATIONS BOARD,
Petitioner

versus

ATLANTA METALLIC CASKET COMPANY,
Respondent

## BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF WRIT

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## BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF WRIT

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## OBJECTIONS TO JURISDICITION AND TO GRANT OF WRIT

Respondent, Atlanta Metallic Casket Company, pursuant to Rule 7, Paragraph 3, and in lieu of a motion to dismiss the petition for certiorari, asserts the following objections to the jurisdiction of this Court, and to the grant of the writ:

(A) This Court is without jurisdiction for the purposes urged by the Labor Board, of admonishing and reprimanding the Judges of the Court of Appeals for the Fifth Circuit with respect to their official conduct in deciding labor cases generally during the past two years, or of "softening up" the said Court in anticipation of many Board cases to be brought before said Court during the next year;

References to Pet. are to the Petition for Certiorari; Tr. to the Transcript, and A. to the Appendix to Respondent's Brief in the Circuit Court of Appeals, which is a part of the Record of this Court.

(B) The charges made by the Board against the Judges of the Court below, in so far as their conduct in deciding the present case is concerned, are without foundation or basis in fact. Indeed, the statements of fact made by the Board in its petition for certiorari herein are in many material respects gross misstatements of the record. Such misstatements were either intentionally made to this Court, or the persons responsible for the filing of the petition did not read the transcript of evidence, the detailed exceptions of Respondent, nor the brief of the Respondent in the Court below;

(C) In the light of the Board's gross misstatements to this Court as to the record in the present case, we believe in the four other cases in which the writ of certiorari is sought, that the Board's attack on similar grounds upon the integrity of the Judges of the Court below with respect to their handling of labor cases during the last two years results either from the Board's *own wilfull failure to accept* or its erroneous concept of its own duties and responsibilities, and an utter failure to observe the fundamental principles of fairness in the handling of cases before it and to deal fairly and accurately with proven facts;

(D) The Supreme Court of the United States is not the proper forum for a determination of the charges made by the Board against the Judges of the Court below, nor of the charges which are herein urged against the Board.

(E) The failure of the Board to notify Respondent or its counsel of intention to seek an extension of time for filing petition for certiorari, and the failure to notify Respondent or its counsel of grant of such extension was such a flagrant abuse and disregard of the spirit of the rules of this Court and of recognized and customary ethics as to require the refusal of grant of writ of certiorari.

(F) As admitted by the Board in its petition for certiorari the instant case does not involve matters of general public interest and moreover the refusal of the Court below to enforce the Board's order was a decision demanded by the evidence as there was no evidence to support the Board's findings.

## A. COURT IS WITHOUT JURISDICTION FOR PURPOSES SOUGHT BY LABOR BOARD

The Labor Board admits in its petition that this case is not one of general importance nor one which in itself even warrants the application for the writ of certiorari:

> "A resolution of this issue depends upon the particular facts of each case and hence no question of general importance in the administration of the Act is presented." (Pet. p. 16).

> "Nevertheless, this is not the type of case which, were it to be considered in isolation, the Board would normally regard as of sufficient public importance to warrant an application for a writ of certiorari to review the refusal of the court below to enforce the Board's order." (Pet. p. 10).

The Labor Board, thus acknowledging that its effort to invoke this Court's jurisdiction is principally for a purpose other than the review of the instant case, discloses its real object, namely: to have this Court take to task, admonish and reprimand the Judges of the said Court of Appeals because of their decisions in the labor cases decided by that Court during the last two years, and to "soften up" the said Court of Appeals in preparation for the many pending Board cases which the Board asserts will come before that Court during the next twelve months. Says the Board:

"We believe, rather, that the court's action results either from its failure to accept, or its erroneous concept of, the statutory scheme for court review of Board Orders." (Pet. p. 20-21).

"On February 12, 1940, this Court in *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206, admonished the court below not to substitute its own judgment for that of the Board on questions of fact. During the ensuing period a much larger percentage of Board orders received enforcement in that circuit. It seems clear to the Board that the court below once again requires correction by this court if the statute is to be effectively administered in the large and important area covered by that court's jurisdiction." (Pet. p. 22-23).

"These applications are being made because the Fifth Circuit has denied enforcement of, or modified, Board orders in an inordinately large number of cases which have recently been before that court on petitions for enforcement of Board orders, and because this experience bodes ill for the large number of Board cases now pending in the area over which the court below has jurisdiction." (Pet. p. 11).

The petition, discussing in some detail twelve Labor Board cases decided by the said Court of Appeals during the last two years, in which the Board's orders were set aside, modified, or remanded, then sets up a comparative chart of decisions in other Courts of Appeals as proof of its charges against the Judges of the court below. In eight of the twelve cases decided by the court below, no review was sought by the Board and there can be no purpose in bringing these cases for consideration before this Court except an improper one.

The statements in the petition for certiorari, in effect, charge the Judges of the Court of Appeals for the Fifth Circuit with a deliberate refusal to accept the requirements

of the statute involved in this and other labor cases decided by that court during the last two years, and therefore, an intentional failure to discharge their sworn judicial duties. It is not the function of the Labor Board to institute proceedings, either for the purpose of admonishing or rebuking the Judges of Federal Courts, or for the purpose of adjudicating as to the performance by Judges of their sworn duties. Certainly it is not within the function of the Labor Board to institute proceedings for the purpose of "softening up" the Judges of our Federal Courts. It is plain enough, moreover, that the Constitution does not confer jurisdiction on the Supreme Court for either of such purposes.

Under the Constitution of the United States, the function of impeachment of Judges is vested in the House of Representatives and the Senate of the United States.

## B. CHARGES BASELESS IN SO FAR AS CONCERNS INSTANT CASE

In its statement of the facts involved in the present case the Board on many material points has grossly misrepresented and misstated the evidence to this Court.

Such misstatements have characterized every step in the Board's handling of the present case. The Trial Examiner, obviously prejudiced, based his recommended findings on carefully chosen, isolated phrases and sentences which were attributed meanings by the Examiner entirely contrary to the meaning of such testimony when considered as a whole. The Examiner likewise made his recommended findings by the convenient method of ignoring or discrediting such portions of the uncontradicted or unimpeached testimony of witnesses, which were contrary to his obvious scheme to find everything against the Respondent. The Board, with minor excep-

tions, swallowed the proposed findings hook, line and sinker, although detailed exceptions of Respondent carefully pointed out the obvious unfairness and error in the proposed findings. Nevertheless, in its petition for enforcement in the Court below, in its brief filed in the Court below, and in its argument in the Court below, the Board continued to adhere to such misstatements of the evidence. Finally, in its petition for certiorari in this Court the same carefully prepared misstatements are urged. Details of such misstatements are dealt with elsewhere in this brief, at page 9 et seq.

## E. FAILURE OF BOARD TO NOTIFY RESPONDENT OF EXTENSION GRANTED FOR FILING PETITION FOR CERTIORARI IMPROPER

If for no other reason, the petition for certiorari should be dismissed for the reason that the Labor Board did not observe the spirit of the rules of this Court, nor recognized and customary ethics in its handling of the motion to this Court for an extension of time for filing the petition for certiorari. In connection therewith the following facts are pertinent:

(a) The petition for rehearing filed by the Board in the Court below was denied May 30, 1949; (Tr. p. 93)

(b) Without notice of any kind to Respondent or its counsel of record, before moving for an extension of time for filing petition for certiorari, the Board on August 26, 1949, four days before the expiration of time for filing petition for certiorari, obtained an order from the Chief Justice of this Court extending the time for filing petition for writ of certiorari to October 28, 1949; (Tr. p. 94)

(c) No notice of any kind was given Respondent or its counsel after the grant of and during the extension of time thus granted for filing petition for certiorari;

(d) The first indication which counsel for Respondent had of any application to this Court for the writ of certiorari was a newspaper item released by the Board and appearing in Atlanta newspapers early in November of this year in which the Board's castigation of the Court of Appeals for the Fifth circuit, through petitions for certiorari, was reported. No mention was made of specific cases in which this attack was made;

(e) The first notice to either Respondent or its counsel of the fact that the Board had obtained an extension of time for filing petition for certiorari was served upon Respondent's counsel on November 7, 1949, consisting of notice of filing of petition for certiorari and a transcript of record showing the extension granted August 26, 1949;

(f) The three month's period for applying for certiorari having expired on August 30, 1949, in so far as Respondent and its counsel were concerned, and no notice having been received of any extension of time, Respondent acted upon its counsel's request for compensation, upon the basis of a termination of the litigation.

## F. INSTANT CASE INVOLVES NO QUESTION OF IMPORTANCE TO THE PUBLIC, AND STATEMENT OF THE CASE BY BOARD CONTAINS MANY MISSTATEMENTS ON MATERIAL POINTS

Respondent concurs with the Board in the following:

(a) That "no question of general importance in the administration of the Act is presented" by the present case (Pet. 18), and that this case in itself is not of sufficient importance to warrant an application for the writ of certiorari (Pet. p. 16);

(b) That the sole question before the Court below was

whether or not there was substantial evidence on the record considered as a whole to support the Board's findings.

The above admission by the petitioning Board should be sufficient for this Court to deny the writ.

However, inasmuch as the Board in its Statement of the Case herein has made so many misstatments of fact on material points, we believe it proper to point out such mistatements, lest this Court be misled.

*The Charges*:

This case involved two basic charges of alleged unfair-labor practices, namely:

I. That one employee, L. C. Kilgore, was discharged because of his union activities; (Tr. p. 11)

II. That the Respondent Company through named supervisory employees had: (1) Expressed its disapproval of the union; (2) Circulated and permitted circulation of an anti-union petition; (3) Urged, threatened, persuaded and warned employees not to assist, become or remain members of the union; (4) Interrogated employees concerning their union affiliations; (5) Made derogatory remarks to a union member in the presence of employees; and (6) Kept employees engaged in union activities under surveillance. (Tr. p. 11).

*Findings*:

The Trial Examiner in his recommended findings sustained the Board on both charges. (Tr. pp. 54, 62). The Board followed the Examiner's recommended findings as to the discharge of Kilgore (Tr. p. 34); and as to the alleged unfair activities of Foremen Camp, Elam, and Streetman; and the taking of an anti-union poll by employees. (Tr. pp. 54, 34, 35).

Items (1), (5), and (6) of Charge No. II were not sustained in the Board's findings. (Tr. pp. 35, 53, 54).

*Board's Misstatements of Fact*:

*Misstatement No. 1—Of Own Finding*: Under the caption "The Board's Findings and Conclusions" in its petition for certiorari the Board states:

> "* * * Assistant General Foreman Streetman, informed one of the Company's old employees, Wilson, that he, Streetman, two of the foremen, and Whitworth, a part-time supervisor, were not supposed to know about the Union's organizing campaign; that they would permit it to 'rock along until it got ripe, and then they would pluck it in the bud'; that they had 'squashed' it on a previous occasion when the Union had attempted to organize the plant and that 'they could squash it again.' " (Pet. p. 3).

The actual finding of the Board was not that Foreman Streetman made such a remark, but that a non-supervisory employee, Wilson, made the remark.

> "The undenied testimony relating to Employee Wilson's report to Streetman wherein Wilson naming Miles, Whitworth and Ragsdale said 'they' were not supposed to know that a union was being organized but that when the time was ripe 'they' would 'squash' it * * *." (Tr. p. 53).

*Misstatement No. 2—Of own Finding:* Under the same caption in its brief the Board states:

> "Whitworth was one of the persons mentioned by Assistant General Foreman Streetman as having been responsible for defeating the Union when it attempted to organize the plant upon a previous occasion and who could do it again." Pet. p. 6).

As pointed out above, the Board's own finding was that the

statement as to a previous union organizing effort at the Respondent's plant was made by a non-supervisory employee, Wilson, and not by Foreman Streetman. (Tr. p. 53).

*Misstatement No. 3—Of Own Finding:* Under the same caption in its petition the Board, in an effort to paint a finding of open company hostility toward the union, refers to a statement by Foreman Miles to an employee as to Miles' personal opinion as to the union, as follows:

> "When Holcombe expressed himself in favor of unionization, Miles announced that 'he didn't want the damn CIO in there' and that 'the day it came in was the day he would leave.' " (Pet. p. 5).

The Board itself, however, found that this was legitimate comment.

> "We are unable to agree with the Trial Examiner that the statement of Foreman Miles to employee Holcombe that he (Miles) 'didn't want the damn CIO in there,' and that 'the day it came in was the day he was leaving,' went beyond legitimate comment by a supervisor. We believe that the above statement was nothing more than an opinion expressed by Miles as to what he, Miles, would do if the Union came into the plant." (Tr. p. 35).

In spite of this, the Board quotes Miles' comment for the obviously unfair purpose of misleading this Court.

*Misstatement No. 4—Of Own Finding:* Under this same caption in its petition the Board states:

> "Prior to being put in charge of the vault department, Whitworth had made several inquiries concerning whether certain employees were union members, had attended a union meeting, and had thereafter circulated one of the anti-union petitions." (Pet. p. 6).

The Board found that at the time of these activities by Whitworth he was a non-supervisory employee. (Tr. pp. 34, 35).

We believe that the Board's comment to this Court on such activities of Whitworth, without stating that they occurred while Whitworth was a non-supervisory employee, was a deliberate effort to mislead.

*Misstatement No. 5—Of Evidence:* Bearing on the discharge of Kilgore, the Board asserts in its petition:

> "At the hearing, no evidence was introduced to show that any employee had in fact threatened to quit unless Kilgore was discharged. Even Whitworth did not so testify, but contended rather that Kilgore was discharged because he did not perform his work properly." (Pet. p. 8).

This statement by the Board is pure fabrication, inasmuch as the evidence was uncontradicted that Kilgore did not like his job; that employees working with him on a four-man team job (fitting metal plates into a break) complained to Kilgore and to Foreman Whitworth that Kilgore would not do his part of the job; that one of the team (Dowda) on whom the weight of the metal was shifted as a result of Kilgore's failure to do his share of the work, threatened to quit; that Kilgore was shown by Whitworth how to do his part of the work, but still failed to do so, and then invited Foreman Whitworth to fire him. (A. 72-75; 80-84; 102-107; 21; 22; 27).

*Misstatement No. 6—Of Evidence:* Bearing upon the employee-instituted and conducted poll, the Board states:

> "By the early part of February, after the union had achieved substantial success in its organizing campaign, the Company commenced its efforts to eliminate the Union as it had threatened to do. Anti-union petitions appeared almost simultaneously in all departments of the plant,

most of them typed on the Company's old time sheets." (Pet. p. 3, 4).

The uncontradicted and unimpeached evidence as to the employee-inspired and conducted poll was as follows:

John H. Wilson, a nonsupervisory employee of Respondent for nineteen years, heard talk that the CIO was trying to organize the workers. (A. 53). Some of the men working for the union said that the union was coming in, and that if employees didn't sign up that they would be out of their jobs when the union did come in. (A. 54). Consequently, Wilson, who thought that a majority of the employees didn't want a union, conceived the idea of a poll by employees to determine those employees against the union so as to discourage the union workers. Wilson testified in this connection:

> "Well, I wrote this right at the top: 'We, the undersigned, do not want a Union,' and I started it off myself and started down the line with it in our department. And then there was some of the other departments heard that—what we was doing, and they wanted—they wanted us to come in their departments and to get the list, and I told them to start with that I wasn't fooling with nobody's department but ours, because they said all the trouble was in our department, and I just wanted to show how many in our department did not want the Union. And another thing, there was some boys in our department told me, and told some of the rest, they was talking around, that they didn't know what to do; they didn't want a Union but some of these fellows working for the Union told them that the Union was coming in there and if they didn't sign up that they—when the Union come in there, they'd be blackballed. That's what they told me—they'd been—they'd be out of a job. And then, they didn't know what to do."
>
> * * * *
>
> "I knew that the majority didn't want the Union, or

I thought they didn't, and I started this to—well, I told them, I said, 'Now, this is among ourselves and all this is for is to let these fellows that's working for the Union know how many don't want the Union and maybe it'll discourage them before it comes to a vote, because if it comes—if they get enough cards signed to come to a vote, there's some of the crowd in here that don't know what to do, and they're liable—they don't know which they—which way they liable to vote.' " (A. 54).

Wilson testified that Mr. Cannon, President of Respondent, was not told about the poll, (A. 54); that, the poll was taken in the several departments, as follows: in his own department, and three other departments by him and employee Emmett Kemp (A. 54 thru 56); in another department by Henry Whitworth, (A. 55); in still another by Kemp and employee Wilkie (A. 56); in another by Kemp, his brother and employee Wilkie (A. 56); in the sewing room, the poll was simply taken and handed to Wilson (A. 57); among the colored folks the first name on the list handled the poll (A. 57).

Wilson estimated that approximately 175 employees signed the poll indicating they did not want the CIO union or a union. (A. 59). Actually, a count of the signatures on the several scraps of paper on which the poll was taken shows a total of 185 employees against the CIO or a union. (Resp. Ex. 1.) Inasmuch as 175 constituted more than a majority, (A. 68), it appeared that far more than a majority of the employees were opposed to any Union coming in. Employees were told by Wilson that the poll was to get everybody who didn't want a union to sign the poll, to discourage the men working for the Union (A. 58). Wilson did not inform Foremen Elam or Camp about the poll (A. 60). Foreman Streetman asked him about the list and wanted to know what it was, and Wilson "just kind of passed it off." (A. 61). Wilson never showed the list to Respondent's President, Cannon (A. 62), and never

took it to the office of Respondent until an investigator from the Labor Board came to Respondent's office, at which time Wilson showed the poll lists to this investigator. (A. 62). Wilson produced the poll lists at the hearing before the Board.

Wilson testified that in one department (spray room) where some 15 or 20 employees worked, they wouldn't sign the poll unless President Cannon "put something on it. If it said Mr. Cannon would head that with something on there, well, they'd sign it." Wilson replied:

> " . . . I told them Mr. Cannon wasn't having a thing to do with that—we was doing that within ourselves—and I didn't think that he knew anything about it, and so they didn't sign the list at all, but they said they didn't want the Union." (A. 69).

Actually, Cannon was out of town during this time. (A. 69).

## CONCLUSION

For the reasons stated herein, it is respectfully urged that the writ be denied.

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